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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

MINIDOKA & SOUTHWESTERN RAILROAD Company and Utah Construction Company, appellants, v. THE UNITED STATES.	No. 19.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On November 17, 1902, the Secretary of the Interior, under authority of the reclamation act of June 17, 1902 (32 Stat., 388), withdrew for reclamation and entry under that act alone, certain public lands in Lincoln and Cassia Counties, Idaho. This withdrawal has continued in force to the present time. A portion of the land so withdrawn was later included in the Southside Minidoka pumping project. Funds were allotted by the Secretary of the Interior, work was commenced, and, prior to any attempt by the defendant

railroad company to initiate rights upon the lands within the project which are now in controversy, a number of main and lateral irrigating canals were completed and put in operation. At the time of the hearing in the Circuit Court the Government had expended a sum in excess of $1,300,000 upon this project (R., 93), the nature and administration of which will be found fully described in the Fifth Annual Report of the Reclamation Service, and reports subsequent thereto.

The defendant railroad company, as appears by its articles found in the record (R., 158), was incorporated in January, 1904, under the laws of Idaho, to operate a line of steam railroad extending from Minidoka, in Lincoln County through Burley, in Cassia County, to Buhl, in Twin Falls County, of that State. As appears by its answer (R., 45), this, constituting its main line, has been constructed and is now being operated by the Oregon Short Line Railroad Company. The original articles were tendered to the Land Department in April, 1904, were declared "satisfactory in form," and were "accepted for filing" under the general railroad right-of-way act of March 3, 1875, 18 Stat., 482. (R., 156.) In March and November, 1908, and again in July, 1909, the company's articles were amended to allow the construction of branch lines, including an extension of its main line, southward into the State of Nevada. (R., 166, 171, 194.) These amendments appear to have been subsequently tendered to the Land Department and

there received, like the original articles, as satisfactory in form. (R., 155, 190.) By the amendment of July, 1909, a line of railroad was projected to extend from the town of Burley, situate on the main line at the Snake River, southerly to the town of Oakley, a distance of 25 miles. It is conceded that for this branch no profile or map of location was ever filed with or approved by the Secretary of the Interior under the general railroad act of 1875, or otherwise. The line was laid out by the company in the summer of 1909 and, as thus located, passed directly through the area withdrawn by the Secretary of the Interior for reclamation, traversing a number of the farm units, and intersecting in its course 3 of the main canals and 10 of the lateral canals which had been constructed and were being maintained and operated by the United States. The lands so traversed had been filed upon by settlers under the reclamation act, and the railroad company, before undertaking construction work, procured deeds from all but one or two of these entrymen, purporting to convey the right of way across their tracts. But neither at the dates of these conveyances nor at the time of the hearing of this cause in the Circuit Court had any of the entrymen made final proof under the homestead laws or paid any part or installment of the cost of the reclamation works.

The railroad company appears to have begun construction work through the other appellant, Utah Construction Company, in November, 1909, and to

have made some progress therein until December 11th following, when the work was suspended on account of the frost and snow. (R., 32.) The bill was filed on December 29th, and the Government's motion for a preliminary injunction was refused. (R., 60.) It appears that the grading had been substantially completed at the time of final hearing, in June, 1910, but that no ties or rails had been laid. (R., 111 *et seq.*) There are on the irrigated area several hundred miles of main canals and laterals already constructed. (R., 102.) By extension of the existing pumping system 8,000 acres can be added to the reclaimed lands. This, however, would require at least one more main canal and possibly a half dozen laterals (ib). Several hundred acres of this land are below the railway location, so that the road must be crossed at increased expense to perfect the water distributing system. (R., 105.) The lands actually occupied by the railway are irrigable and valuable for agriculture. The railway, of course, withdraws them from agriculture and the railway construction diminishes or destroys their value for that purpose. (R., 94.)

The District Judge both on the preliminary motion and at final hearing, was of the opinion that the Government was entitled to no relief other than the protection of its existing canals where crossed by the railroad. (R., 60, 122.) *United States* v. *Minidoka & Southwestern R. R. Co.*, 176 Fed., 762. Accordingly a final decree was entered (R., 79) in which the structures to be erected and maintained

by the railroad company at such crossings were specified, but relief was otherwise denied to the complainant.

Upon appeal the decree was reversed by the Circuit Court of Appeals with instructions to grant the injunction as prayed, to continue until the court shall be advised that the construction of the railroad has been assented to by the United States as well as by the settlers whose lands are traversed thereby, the evidence of the consent of the United States to be "the approval of a profile map of the right by the Secretary of the Interior." (R., 203.) *Minidoka & Southwestern R. R. Co.* v. *United States*, 190 Fed., 491.

The case involves the construction of the act of March 3, 1873 (17 Stat., 602), compiled as section 2288 of the Revised Statutes and reenacted with amendments on March 3, 1891 (26 Stat., 1097), and March 3, 1905 (33 Stat., 991), which purports, among other things, to permit bona fide settlers under the preemption, homestead, and other settlement laws to transfer by warranty against their own acts portions of their claims for railroad rights of way; the general railroad right-of-way act of March 3, 1875 (18 Stat., 482), and the reclamation act of June 17, 1902 (32 Stat., 388). All of these acts are correctly printed in full in the appendix of the appellants' brief, so that it is unnecessary for us to reproduce them *in toto*, but relevant portions will be quoted at the proper places as our argument proceeds.

RÉSUMÉ OF APPELLANTS' ARGUMENT.

All of the lands in controversy are covered by the filings of claimants under the reclamation law. This fact led the trial court to hold the general railroad right-of-way act inapplicable, upon the theory that lands subject to such inchoate private rights are not "public lands" within the intent of that statute. The act of 1875 having thus been removed from the case, the railroad company's intrusion within the reclamation project was held justified by the conveyances which it had secured, and presumably would secure, from the particular settlers whose claims were traversed by the location, the trial court being of the opinion that by Revised Statutes, section 2288, these farmers were fully authorized to grant a right of way effective at least while their entries were in good standing, and declining to decide what would happen to the title if the entries themselves should be subsequently forfeited or abandoned. Appellants stand squarely upon this somewhat remarkable doctrine that the entrymen, by an act originally passed in 1873, and whose purpose in this regard was manifestly unaltered by the amendments, were commissioned with the serious duty of weighing the advantages and disadvantages of railroad construction and railroads to a project in the active care and management of the Government—a project adopted pursuant to a policy which was not conceived until nearly 30 years after that act was

passed, and involving the expenditure of enormous sums of public money and the happiness and fortunes of hundreds of settlers and their families. The appellants, in their brief, go even farther than the trial court, since they argue that the conveyances of these few farmers will operate, either alone or in connection with the mere filing in the Land Department of the railroad company's articles and proofs of incorporation, to convey a permanent right of way, independent of the future standing of the reclamation entries.

THE GOVERNMENT'S POSITION STATED.

The opinion of the Circuit Court of Appeals (R., 203), in which the three judges united, points out very clearly that, although lands of the United States which are subject to the filings or inchoate claims of individuals may not be "public lands" in the sense of some granting statutes, they are such in the sense of the general railroad right-of-way act of 1875, inasmuch as that act itself makes mention of them and specifically provides the means whereby the interests of such possessory claimants may be condemned. That court therefore, being also of the opinion that lands withdrawn for entry under the reclamation law do not fall within the terms of the fifth section of the act of 1875, which excepts from its operation "any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale,"

holds that the company's rights, as against the Government, must depend entirely upon a compliance with that statute. It regards the act of 1873 as a companion piece of the act of 1875, the latter providing the means whereby the company may obtain title from the Government through public lands, whether filed on or not, and condemn possessory rights, and the former affording a way whereby the company may acquire, *pro tanto*, the interest of the settler, by agreement, without resort to a proceeding in condemnation.

> These two statutes [says the opinion], taken together, appear to meet the requirements of the situation, and to authorize the railroad company upon complying with certain conditions to acquire from both the Government and the settler a right of way which the Government should not in justice to the settler grant without his consent, and which the settler could not convey without the permission of the Government, since he can only "transfer by warranty against his own acts." (R., 207.)

Thus the Court of Appeals in effect rejects the idea that by the act of 1873 a mere possessory claimant is authorized, at his pleasure, to grant a railroad easement, whether permanent or conditioned upon the persistence and perfecting of his entry. Its decision turns finally upon the proposition that, as against the Government, the railroad company, dependent as it is upon the act of 1875,

acquires no right until the profile map of its line has been filed with and approved by the Secretary of the Interior, as that act prescribes.

Our position accords perfectly with the argument and conclusion of the learned court below, save in this one particular: We argued before that court and we respectfully insist here that lands withdrawn for irrigation and settlement under the reclamation act do not fall within the purview of the act of 1875 at all, except in so far as the Secretary of the Interior is empowered to modify their status under the reclamation act itself. The act of 1875, as we have seen, by its fifth section excludes all lands of certain described kinds of reservations and all "other lands specifically reserved from sale." We contend that the lands of a reclamation project fall within the spirit, if not the letter, of this exclusion; they are "specifically reserved from sale" in the true sense of the statute. The learned court below seems to have assumed (R., 206, 207) that such lands are offered for *sale* in the usual sense of the term. It is true, as indicated by the title of the reclamation act which the opinion quotes, that the lands are reclaimed by moneys derived from the sale of public lands; but those, of course, are other lands disposed of under other laws. The tracts reclaimed are not sold; they are disposed of under the homestead law, minus the commutation provision, and the reclamation law; the entryman acquires them by residence and culti-

vation, and by restoring to the Government his pro rata share of the cost of constructing, maintaining, and operating the works. The private owner in the project pays in the same way and at the same rate as the entryman. The act of 1875 was meant to apply only to those public lands which were on the market, or otherwise subject to be disposed of, under general laws, free of any retained interest or responsibility upon the part of the Government. Such are not the lands in the reclamation projects. The Government, as will be shown more fully in the course of our argument, has a peculiar interest and a peculiar responsibility touching all of the lands of such a project as long as the project is *in fieri* and until the duty of the Government to manage it and perfect it has been fully performed. We incline to the opinion that the Secretary of the Interior, by virtue of the broad powers which he possesses under the reclamation act, may be authorized in his discretion to release lands from withdrawal to the extent necessary for the granting of a railroad right of way through the irrigable areas, if he thinks that a railroad may be constructed and operated there without harm to the project as a whole. But even if this be unsound, supposed need of railroads in such places can afford no excuse for stretching the legislation providing for rights of way across the ordinary public domain.

Finally, as held by the learned court below, the act of 1875, if applicable to these lands, requires the beneficiary to file a "profile" or a map of defi-

nite location, and requires the approval thereof by the Secretary of the Interior before any right under the act can vest as against the Government. Manifestly the appellant company has acquired no standing under that statute, and it is doubtless due to the certainty of this proposition that opposing counsel practically stake their entire case upon the conveyances of the settlers.

ARGUMENT.

I.

The right to build and operate a railroad through a reclamation project without consulting the Government should not be adjudged to exist unless plainly conferred by some act of Congress.

The act of 1875, when complied with, grants a way over the ordinary public lands, but even this, as we shall seek to establish, is dependent upon the approval of the Secretary of the Interior, the guardian of the people's interests in the public domain. (*Knight* v. *Land Ass'n*, 142 U. S., 161, 181.) Here the railroad company advances the remarkable contention that railroads may be laid out *ad libitum* through all of the vast and complex reclamation projects, over land which is specially reserved and dedicated to a special form of use and disposition and for the accomplishment of definite results of the utmost public importance, if only a few of the settlers, upon being paid to their personal satisfaction, will vouchsafe their consent. This court has

recently had occasion to inquire quite deeply into the objects and mechanism of the reclamation policy (*Swigart* v. *Baker*, 229 U. S., 187), so that it is hardly necessary for us now to do more than refer to a few prominent features. The plan requires active care and management of each project by the Secretary of the Interior until the cost has been largely repaid to the Government. Entrymen do not acquire any title or control until that has been done, and not even then do they gain control of the irrigation works. The projects include enormous areas of arid or semiarid land, and involve the expenditure of enormous sums of public money for the irrigation of these areas.

The peculiar plan of the legislation is to accomplish reclamation and establish large communities of prosperous farmers through the lending of public funds. The farmers are expected to pay back the entire investment in the end, and the trust in their ability to do this is largely founded upon the assumption that by a careful management of the project during the earlier stages of its operation, while it remains under the control of the Government, and by allowing ample time, the farms will become very productive and render to the settlers a sufficient profit to enable them to meet the assessments as they accrue. Thus the whole success of a project—the return of the Government's investment and the prosperity of the farmers who are liable therefor—must be dependent upon the care with which it is conceived and executed while the

Government is in charge. Now, the complexity of the problem is as obvious as its importance, and any doctrine which tends to diminish the discretionary power of the Secretary of the Interior to deal with it in all of its aspects should be scrutinized with the utmost caution before it is adopted by the courts. It will be perceived at once that the construction of even one railroad through a reclamation project *might* be productive of very serious injuries. The irrigable lands are frequently divided into tracts which are quite small, the policy being to encourage intensive cultivation and to limit each entry to an area which will suffice to support a family. To bisect a small irrigated farm or orchard by the grades and cuts of a railroad might spell the difference between success and failure for its owner, according to the degree in which his access and his ability to irrigate effectively were curtailed. The Government not only holds the fee of the land but is directly interested in the use that is made of it. If an injury is done to the farming efficiency of any of the irrigable units the capacity of that unit to supply the funds which the Government is obliged to collect is to that extent impaired, with the possibility of loss to the Government or the other settlers. Hence, in exercising his broad discretionary functions under the reclamation act, the Secretary of the Interior would not be performing his duty if he permitted each farmer to do as he pleased with the tract intrusted to his possession, especially as, in an area dependent upon irrigation, a thing done upon

one tract may work havoc not to that tract alone but to many others also and to the project as a whole. It is even within the realm of possibility that the existence of a railroad might prohibit the extension of a canal upon which the reclamation of a large area of arid lands depends. In this very case, there is evidence tending to show that the railroad, if constructed, may seriously hamper the future development of the project.

Manifestly it would not be reasonable to leave the decision of such important matters to the settlers over whose allotments the railroad is projected, and to whom the company offers its money by way of compensation for what *they* are supposed to give up. They do not share the responsibility of the project management. They may not even be expected to know or consider what will be the effect of the railroad construction upon the lands of others or the project as a whole. They may be incompetent; they may be dishonest. It would not do to regard them as representing the Government or their fellow settlers in any respect.

The appellants' response to such suggestions as these is to remit the Government to the courts for the protection of its rights when invaded. But this is taking powers and responsibilities away from the executive, where they distinctively belong, and lodging them with the judiciary. The substitution is unwise and vicious, and the more so because necessarily it would not be complete and cover all cases wherein a remedy might be needed. Would

the court undertake to decide whether or not a railroad through a reclamation project is necessary or desirable? Or whether, for the success of the project, it would be best to have it located here or there? Or how many lines of railroad through the same project would be convenient and tolerable? Would it limit its relief to the protection of the existing canals, as was done in this case, or would it also insure the Government against the pecuniary loss that would arise from injuries done directly to the units traversed, and indirectly to the other units of the project? Would it attempt to forecast the effect of one railway or two or a dozen upon the success of the project and the repayment of the Government loan? All these things, and many other considerations which might be suggested, are obviously not of judicial cognizance. The relations of railroads to reclamation projects present a complex of engineering, agricultural, and economic or business problems which could neither be adequately explained nor suitably resolved in litigation. It will not assist the Secretary of the Interior to perform the very serious and complicated duties laid upon him by the reclamation act to pare down his discretionary authority, to cut away powers which should normally be vested in him as the general agent of the Government and transfer them to private individuals whose use of them may be selfish and unwise and subject to only a limited control by the courts. The statutes upon which the railroad company relies should be construed to avoid

this evil, if possible; if necessary, they should be *strictly* construed; for though it may be conceded that to help their obvious purpose a fairly liberal construction may be accorded to such acts, yet where it is sought to extend them beyond this, so that they may work interference and injury to the operations of the Government itself, subjecting even the public investments to the safe-keeping of railroad corporations and homestead settlers, this liberal doctrine should give way to the doctrine of strict construction.

The expediency of having the railroad made and operated, and the thought that without recourse to the settlers' conveyances there would be no way in which the work could be authorized, appear to have made an influential appeal to the mind of the learned district judge. But we think the argument *ab inconvenienti* can be applied more strongly from the other side. The inconvenience and dangers of allowing railroads to be run through the reclamation projects without any responsible supervision are too obvious for discussion. If a railroad is needed, or can be constructed and operated without harm to a project, it may be assumed that the Secretary of the Interior will approve it if he has the authority to do so. If he has not, his disability assuredly is no reason for lodging so extraordinary a power in a few of the settlers. The defect should be supplied by Congress, and the railroad may well wait until Congress has acted.

II.

The act of March 3, 1873, as amended, does not empower the entrymen to authorize the construction of a railroad through a reclamation project without the consent of the Secretary of the Interior.

1. *History and general purpose of this legislation.*

As originally enacted on March 3, 1873, this statute was as follows:

> That any person who has already settled or hereafter may settle on the public lands of the United States, either by preemption, or by virtue of the homestead law, or any amendments thereto, shall have the right to transfer by warranty, against his or her own acts, any portion of his or her said preemption or homestead for church, cemetery, or school purposes, or for the right of way of railroads across such preemption or homestead, and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to their preemptions or homesteads. (17 Stat., 602.)

It passed into the Revised Statutes (section 2288) without substantial change, as a part of the chapter on "Preemptions."

By section 4 of the act of March 3, 1891 (c. 561, 26 Stat., 1097), this section, with others relating to preemptions, was repealed; but by section 3 of the same act (*ib.*) it was reenacted so as to read:

> Any bona fide settler under the preemption, homestead, or other settlement law shall have the right to transfer, by war-

> ranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim.

By the act of March 3, 1905 (33 Stat., 991), the section was again reenacted, without change beyond the introduction of the words "telegraph, telephones," after the word "railroads."

The general purpose of the act was undoubtedly to legitimate a broader use of the settler's *possession* than was authorized by the settlement laws. Those laws in effect forbade him to transfer any part of his interest whatsoever, and visited his claim with a forfeiture if he did so. The object of this act was to relax this stringency. Corroboration of this is found in section 2291 of the Revised Statutes, part of the homestead law, which provides that a claimant in his final affidavit must state that no part of the land has been alienated "except as provided in section twenty-two hundred and eighty-eight."

See *Cascade Pub. Service Corporation* v. *Railsback* (59 Wash., 376).

The amendments added new uses, and extended the privilege to include new species of settlements, but it will not be contended, we assume, that the general purpose was altered in its character so as to subject the public interests of the Government to a

power of the private claimant which would not have existed under the original act.

2. *The act merely authorizes the settler to relinquish in part the privileges which he enjoys under the settlement law, not to convey the title or to impair in any way the interest of the Government.*

This proposition naturally divides into two others: (*a*) That the settler is allowed to relinquish his own possession merely, and is not constituted an agent to act for the Government in disposing of more; and (*b*) that where the settler's interest is so commingled with the Government's interest that a proposed enjoyment of the one would be detrimental to the other, the act is necessarily inapplicable.

(*a*) In *Davis* v. *Foreman* (14 L. D., 146, 152), a decision by Secretary Noble, it is well said:

> It is merely repeating a truism, to say that the homestead law was enacted for the benefit of those seeking homes upon the public domain; the theory of the law is, that the land thus entered is to be used and retained as a home, as a place of abode for the entryman and his family.
>
> * * * * *
>
> In that provision of the law which requires a claimant to make affidavit that no part of the land has been alienated, it must be assumed that the word "alienated" was used in its ordinary acceptation, and that the intention of Congress was to prevent the transfer of possession of the lands embraced

> in the entry, to another party, the lands were to be retained in the possession of the entryman for his home and for the support of himself and family. This view is clearly sustained by the provisions of section 2288, Revised Statutes; which permits an entryman to transfer, by warranty against his own acts, any portion of his homestead for church, cemetery or school purposes, and for the right of way of railroads across such homestead and such transfer shall in no way vitiate the right to complete and perfect title to his homestead. In these cases the entryman has not transferred a portion of the land embraced in his homestead, because *the fee is not in him and may never be, he has simply transferred his right of possession* to that portion of his entry both while the title remains in the Government and after it has passed to him; but the law provides that his right of transfer or alienation of possession of a portion of his claim shall cease at this point, and if he attempts any further transfer or alienation, he shall be prohibited from completing title to the land embraced in his entry.

We are not aware that this authoritative construction has ever been questioned in any other decision of the Land Department or of the courts. The construction is reasonable and in perfect fit with the statutory language. It is not to be presumed that Congress would confer upon possessory claimants an unrestricted authority to burden the

fee of the Government. Express words would be required for this. And the words used are actually indicative of a contrary purpose. The act does not purport to grant anything; it merely permits the settler to make transfers "by warranty against his own acts" which shall not vitiate his claim. He is permitted to transfer "any portion of *his claim*" (*Eimer* v. *Wellsand*, 93 Minn., 444, 447); he is not made an agent to convey the Government's fee. When Congress intends to convey a vested interest in the public lands it invariably does so in express words or authorizes some executive officer to do so. If we take the letter of this statute it merely empowers the settler to yield a portion of his possession; to transfer that which is already his but which he may not pass over to another without this express authorization. And this first, or literal, meaning corresponds with a purpose which is obvious and which fully suffices to explain the enactment. Any larger intendment, therefore, could only be justified upon the score of convenience, which would be no justification at all. It may be more convenient to the uses mentioned to devest the Government of its fee, but the retention of the fee is not inconsistent with the uses. It may even be of convenience to the Government.

(*b*) The act is no authority for a settler to transfer, even for one of the uses specified, if, because of the peculiar status of his holding, the new use would clash with a governmental interest. This

proposition is closely related to the one next following, but the two are not the same. Our suggestion here is that while the possession and usufructuary right of the ordinary homestead settler are broad enough to cover any of the uses mentioned in this act if attempted by the settler himself, and while, therefore, such a settler in transferring for such uses is but transferring an interest or privilege which was already within the potential scope of his claim, the possession of the settler under the reclamation act is more narrowly conditioned. He himself could not lawfully perform acts upon his tract which might tend to interfere seriously with the governmental care and administration of the project. Consequently he could not "transfer" such a right to anyone else under this statute.

3. *As to lands which, like the lands of reclamation projects, are affected by a special public interest, the act of March 3, 1873, if applicable at all, should be construed as a means of securing the consent of the settler to the uses mentioned, but not to permit those uses in the absence of governmental approval.*

(*a*) It may be doubted whether this statute has any application whatever to holdings of this character, since it has always been the policy of Congress, in disposing of the public domain, to except those parcels which have been reserved or which have been devoted to governmental activities, and we believe it to be the settled doctrine of this court

that such an exception will be presumed if it is not expressed.

Wilcox v. *Jackson*, 13 Pet., 496, 513.
Scott v. *Carew*, 196 U. S., 100.

When this law was first enacted there were no public land laws under which it was possible for private and public interests to become so interblended as they are in the reclamation homestead entries. All of the lands which then were subject to private entry were lands which the Government was willing and was offering to dispose of outright to purchasers and settlers; and what the settler did upon his claim, or what he permitted others to do, was of no consequence to the Government, if it did not violate the terms of the settlement laws or amount to the commission of waste. This statute should be construed in the light of the conditions which existed at the time when its purpose was conceived. It should be construed in the light also of the "homestead law" and the "settlement" laws of that time. This necessarily excludes the reclamation act, which is a settlement law, not *ejusdem generis*, but very different in kind from any known or contemplated when the act was passed, and evidences a policy not developed until years afterwards.

The construction adopted by the Circuit Court cleaves to the bare letter while ignoring both the limited purpose of the act construed and the invariable policy of Congress to save the special inter-

ests of the Government from its grants of the public domain.

4. *Construed in pari materia with the reclamation act, the act of March 3, 1873, as amended, can be deemed operative only in so far as consistent with the proper management and welfare of such projects. This necessarily implies that the transfers of the settlers must remain ineffectual if not approved or if objected to by the Government through the Secretary of the Interior.*

Hitherto we have assumed that the original purpose of the act of 1873, in the aspect here involved, was not altered by the amendments. Let us now assume March 3, 1905, as the date of origin, three years later than the reclamation act. The public land laws are all *in pari materia;* no particular statute should be construed as an insulated act, upon its own letter, but all should be construed together as an harmonious system. The reclamation act puts upon the Secretary the duties of planning, constructing, maintaining, and operating the projects, and of collecting the cost thereof, and expects him, at the proper time, to turn each project over to the water users "as a going concern." (*Swigart* v. *Baker*, 229 U. S., 187, 197.) He is given the full responsibility of executing the act, and is expressly thereby "authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full

force and effect." Reclamation act of June 17, 1902 (32 Stat., 388, sec. 10.)

The act of 1905 should not, because it need not, be construed either as modifying the reclamation policy or as curtailing in the slightest degree the ability of the Secretary to render that policy effectual. Therefore, if we say that the act of 1905, being later than the reclamation act, was intended to reach the reclamation units, we must also say that its application there is subject to the broad supervisory and protective power of the Secretary under the reclamation act, and this without regard to whether the act of 1905, in its application to ordinary homestead claims, would permit the settler to convey the fee or only a conditional possessory right similar to his own.

Otherwise we should incur the absurdity of saying that Congress, without express words and contrary to the general presumptions in such cases, intended in this instance to confer upon the settlers a power without supervision, to dispose of the irrigable lands for railroads, cemeteries, schools, etc., without any limit whatsoever, without any consideration moving to the Government, and without any regard for the interests of fellow settlers or the Government, and that as against this extraordinary authority, the Government, with its enormous investments and extensive obligations, is theoretically without protection, save as it may rely upon the courts to prevent obstructions to existing canals.

III.

Construction and Application of the General Railway Act of March 3, 1875.

1. *Discussion of the applicability of this statute to lands which are subject to private claims.*

The Circuit Court decided and the appellants here insist that the statute applies only to the vacant public domain.

If this were so, we do not see that the case would be improved for the railway company, for its right would then be entirely dependent on the act of 1873, the significance of which we have attempted to explain above.

The Land Department seems to have construed the act of 1875 as applying only to lands to which no private rights or claims have attached. We believe, however, that the true view is the one adopted by the learned court below, and that the statute was intended to afford the means whereby the whole interest of the *Government* in the rights of way contemplated could be acquired consistently with the protection of the interests of private claimants where the lands traversed had been settled or filed upon.

The appellants' contention rests upon their interpretation of the term "public lands," as used in the first section of the act. It is true that this term has frequently been held by this court to exclude lands affected by private interests, and it is undoubtedly correct to say that in acts, whether

special or general, purporting to make grant of complete title, this is the interpretation which should be adopted in the absence of any satisfactory evidence of a contrary legislative intent; for, obviously, if such grants were not so restricted, Congress, with its plenary power over lands subject to possessory claims like unperfected homesteads, would be placed in the attitude of ignoring and overriding the settlers and others who were claiming in good faith under other laws.

But where, as was suggested in *Union Pacific R. R. Co.* v. *Harris*, 215 U. S., 386, 388—a case much relied on by the appellants and discussed on page 17 of their brief—it is " apparent either from the context or from the circumstances attending the legislation " that this term " public lands " was meant to include lands subject to private claims, as well as those that are not, the term will have the broader scope, the question being purely one of legislative intention. See opinion of court below (R., 205); *United States* v. *Blendaur*, 128 Fed., 910, 913.

Now, in the right-of-way act the words " public lands " are used in two places. In section 1 a right of way is granted over " the public lands," and in section 3 the Territorial legislatures are authorized to provide for the manner in which " private lands and possessory claims on the public lands of the United States " may be condemned. It is beyond question that " possessory claims " as here used

includes claims evidenced by entries as well as mere squatter rights. *Spokane Falls Ry. Co.* v. *Ziegler*, 167 U. S., 65; *Enoch* v. *Spokane Falls & Northern Ry. Co.*, 6 Wash., 393, 33 Pac., 966, 967; *Railway Co. v. Sture*, 32 Minn., 95; *Larsen* v. *Navigation Co.*, 19 Oreg., 240, 23 Pac., 974.

Congress having in the third section of this act expressly used the words "public lands" to designate lands of the United States affected by subsisting entries, the presumption is that so far as the mere right of way is concerned it used the same words in the same sense in section 1. We think that Congress by this act intended to provide a complete scheme by which railroad companies might acquire a perfect right of way over all lands not reserved or appropriated to the particular purposes of the United States; and to that end it provided means for acquiring a perfect right of way as against the Government, subject to existing private claims, and then added a compulsory method for obtaining rights from entrymen and settlers who refused to convey in accordance with the permission given them by Revised Statutes, section 2288.

If this were not so, title to those portions of a right of way which depended on transfers by deed or condemnation from mere possessory claimants might fail if their claims were forfeited or abandoned. The company, at all events, would not in such cases acquire any title good as against the Government. Here, of course, we realize that our opponents will say that the settler, even a mere

squatter, perhaps, is commissioned to convey the fee or a permanent vested easement, and that an equivalent title will be obtained by a condemnation of his possessory interest. But why insist on so anomalous and uncalled-for a way of alienating a public title when a reasonable construction of the statute allows the thing to be done in an orderly way by governmental action, through the approval of the Secretary of the Interior?

In *Washington & Idaho Railroad* v. *Osborn*, 160 U. S., 103, this court, construing this act, held that Osborn, a settler on unsurveyed land, who intended at the proper time to claim a preemption right, could not be dispossessed by a railroad company without proper compensation. The court, on the authority of *Buxton* v. *Traver*, 130 U. S., 232, 235, held that the settler, even though he had erected very valuable improvements, had not acquired any right whatever, as against the United States, saying (p. 109):

> It must, therefore, be conceded that Osborn did not, by maintaining possession for several years and putting valuable improvements thereon, preclude the Government from dealing with the lands as its own, and from conferring them on another party by a subsequent grant.

Nevertheless it was adjudged that his claim was one of the "possessory claims on the public lands of the United States" intended by the third section of the act, and must be condemned and paid

for as therein provided. Obviously, in condemning this settler's inchoate interest, the railroad company could not acquire nor should it be obliged to pay for the Government's fee. The proceeding would leave the Government's title untouched. The same thing would be true if the settler had filed a homestead claim. The Government's rights could be devested only by the filing and approval of a map as the statute prescribes.

There are very serious theoretical and practical objections to the idea of permitting a mere settler—one who may not even have filed a paper in a land office and who may be nothing better than an irresponsible nomadic squatter—to encumber the land of the Government in which he has acquired no interest whatever, and we find it impossible to believe that this statute, any more than the act of 1873, was intended to confer so unusual and uncalled for an authority.

The decisions of the Land Department upon which appellants rely appear to have assumed, quite unnecessarily we think, that if this statute were held applicable to the public lands to which private claims have attached the Secretary's approval of a location over such lands would vest the grantee immediately with a permanent easement in derogation of the equities of the claimants. But this theory, as we have seen, overlooks the fact that such claims are protected by the act itself and debars the grantee from the means of acquiring a uniform and certain title to its right of way.

2. *Under this statute no vested right arises against the Government until a map showing the railroad location has been filed with and approved by the Secretary of the Interior.*

Opposing counsel contend that, even if the statute be held to apply to entered lands, the railroad company had acquired a right of way as against the United States by filing its articles of incorporation and proofs of organization with the Secretary of the Interior and constructing a railroad over the lands in question. In support of this position they rely almost wholly upon the case of *Jamestown & Northern Railroad Co.* v. *Jones*, 177 U. S., 125.

(*a*) It is to be noted, however, that in that case there was a railroad completed and in operation upon the land when Jones took the first step to initiate a claim to it under the preemption laws, and that thereafter a map was filed by the company and approved by the Secretary of the Interior. On that state of facts the court held that, although the entry antedated both the filing and approval of the map, the claim of the company must nevertheless be deemed first in time, and, by relation, first in right.

In *Minneapolis, St. Paul, &c., Ry. Co.* v. *Doughty*, 208 U. S., 251, this court held that the doctrine of the *Jones case* could not be extended to a case in which the railway company at the time of the filing of a homestead entry had done nothing more upon the land than to stake out the central line of its road as finally located by its board of directors.

In the present case, when the bill was filed, the railroad company had merely staked out the line of its road and commenced the work of grading the roadbed. That work did not begin until about November 11, 1909, and this suit was commenced on December 29 following. The work, therefore, had been in progress about 48 days. The grading was substantially completed at the date of the final hearing, namely, on June 10, 1910, but not, so far as appears, in any part, when suit was begun. It is clear, therefore, that the doctrine of the *Jones case* does not apply here, even if that case is applicable in any case as against the United States. On the state of facts then existing the present case approaches more nearly to that of *Minneapolis, St. Paul, &c., Ry. Co.* v. *Doughty, supra.* As was said by the Circuit Court of Appeals in this case "the road has not been constructed and is not in operation over its projected right of way." (R., 209.)

(*b*) It is submitted, however, that neither the *Jones case* nor the *Doughty case* decided anything as to the rights of the railroad companies against the United States. No rights of either company as against the Government were involved. In each case the sole contest was between two private parties, each claiming priority of right over the other. And, while in the *Jones case*, this court advanced some reasons and used some language which, taken literally, would seem to indicate an opinion that, by construction alone, without the filing or approval of a map, a right of way might be acquired as

against the Government, yet it is respectfully suggested that these parts of the opinion were *obiter;* the case *decided* only that, by filing its articles of incorporation and constructing and operating its road before the preemption entry was made, the railroad company had initiated the first claim, and that its title, subsequently secured by the filing and approval of a map, related back to that time, cutting out the intervening claim of the preemptioner. The case is quite the same in principle as *Weyerhaeuser* v. *Hoyt*, 219 U. S., 380, in which, putting aside unnecessary expressions to the contrary in other decisions, it was held that the filing, by a railroad company, of a selection of lieu land initiates a *claim* and fixes a time to which the title will relate if the selection is subsequently approved by the Secretary of the Interior. This analogy was clearly pointed out in the case of *Stalker* v. *Oregon Short Line*, 225 U. S., 142, 149.

Taking the *Jones* and *Doughty cases* together and considering only the matters necessary to the decision of the questions actually involved, they are entirely consistent with each other and establish the law substantially as follows:

The filing of articles of incorporation and proofs of organization and the construction of a completed railroad give the company priority over one subsequently entering the land under the general land laws, though no map of the route has then been filed or approved; but the filing of such articles and the

definite location and staking out of the line without actual construction do not give such priority; and the filing and approval of a map do not relate back to the date of definite location so as to give priority over an intervening entry.

The provisions of the statute directly relevant to the present question are as follows:

> The right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road. * * * (Sec. 1.)
>
> That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way. * * * (Sec. 4.)

The first section employs words of present grant; but under a general law like this, in which no grantee is particularly named or intended, it is entirely clear that no grant takes place until a qualified grantee appears and performs the statutory conditions.

> There can not be a grant unless there is a grantee, and consequently there can not be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not presently. In all the cases in which we have given these words the effect of an immediate and present transfer it will be found that the law has designated a grantee qualified to take, according to the terms of the law, and actually in existence at the time.
>
> *Hall* v. *Russell,* 101 U. S., 503, 509.

The appellant railroad company did not come into existence until long after this law was enacted.

The grant of the swamp-land act is expressed in the present tense, but title does not vest thereunder until the lands have been identified and selected by the grantees and the selections approved by the Secretary of the Interior.

> *Little* v. *Williams,* 231 U. S., 335, 339.

The railway act declares that in order to secure its benefits the applicant *shall* file a profile of its road for the approval of the Secretary. There is certainly no expression in the statute, and we are

utterly unable to find there any ground for an implication, that a railway company may dispense with this condition entirely by merely appropriating the land. If title could be acquired in that manner, why not also under the swamp-land act and the acts governing the acquisition of lieu lands by railway companies?

As this court said in the *Doughty case, supra:*

> * * * But section 4 gives little play to construction or the analogies which the company invoke. That section determines the priority of rights between railroads and settlers by explicit language. A right of way is granted, but to secure it three things are necessary: (1) Location of the road; (2) filing a profile of it in the local land office; and (3) the approval thereof by the Secretary of the Interior, to be noted upon the plats in the local office. It is after these things are done that the statute fixes the right of the railroad and subjects the disposition of the land, under the land laws, to that right. "And thereafter," are the words of the statute, "all such lands over which such right of way shall pass shall be disposed of subject to such right of way." It would be a free construction of these words to give them the meaning for which the railroad company contends. They neither convey an unnatural sense or lead to an unnatural consequence. Unless rights under the act of 1875 and rights under the land laws were to be kept for an indeterminate time in uncertainty and possible con-

> flict, to fix some act or point of time at which they should attach was natural, and to construe language which is apt and adequate by its sense and arrangement to express one time to mean another, would be a pretty free exercise of construction. We admit that the letter of a statute is not always adhered to and words may be transposed, but the necessity for it must be indicated to accomplish the purpose of the legislation. There is always a presumption that the words were intended as written and in the order as written: certainly, when they express a definite sense which would be changed to another with different and opposing legal consequences. (208 U. S., 257.)

And in *Stalker* v. *Oregon Short Line, supra,* page 151, the court, referring to the *Doughty case,* observed:

> What is said in the opinion about the grant of a right of way being dependent upon the doing of three things—location of road, filing profile of it in the Land Office, and the approval thereof by the Secretary of the Interior—and that "*thereafter* all such lands over which such right of way shall pass shall be disposed of subject to such right of way," refers to the nonvesting of any right *as against the United States.*

The act of the Secretary in accepting the company's articles and approving its map is judicial in quality. It is this act which sets a grant in operation.

> When this was done, the granting section of the act became operative, and vested in the railroad company a right of way through the public lands.
>
> *Noble* v. *Union River Logging Co.*, 147 U. S., 165, 172.
>
> See, also, *Weyerhaeuser* v. *Hoyt, supra,* and *Phoenix, &c., R. R. Co.* v. *Arizona, &c., R. R. Co.*, 9 Ariz., 434, 441.

In *United States* v. *Rickey Land & Cattle Co.*, 164 Fed., 496, 500, which involved rights of the United States in conflict with a private claim under the irrigation right of way law of March 3, 1891 (c. 561, secs. 18, 19, 26 Stat., 1101), the court, referring to section 19 thereof, which, *mutatis mutandis*, is identical in substance with section 4 of the railway act of 1875, says:

> It will be seen that by the express terms of this section, in order to acquire a right of way over public lands for canal and reservoir purposes under the act of which it forms a part, it is essential that the map of the location of the canal and the reservoir shall be approved by the Secretary of the Interior. Such approval is a condition precedent to the taking effect of the grant of right of way for the purposes named in the preceding section of the act.

It will be noted that the map must be filed in all cases, whether the lands traversed be surveyed at the time of location or not. In the present case the lands were surveyed and the map could have been submitted at any time.

The theory that a title may be acquired by construction was evidently induced by the thought that as, where the lands are unsurveyed at the time of location, the filing may or must be deferred until the public survey has been made, it could not have been intended to defer the construction correspondingly, especially since the *proviso* in section 4 apparently contemplates that the railroad shall be completed within five years after location. The argument, no doubt, affords ground for the conclusion that a company is licensed to proceed with construction over unsurveyed land, where there is no public objection, and with less reason it might be applied to surveyed land; but it affords no justification for converting a mere license into a vested right. Even the real or supposed inconvenience of leaving the company, with its railroad built, dependent for full title on further action by the Government, can not excuse the obliteration of the plain terms of a statute. This act declares that maps shall be filed in all cases. They must be passed upon by the Secretary of the Interior. If he finds that the applications conflict with the interests of the United States, or for any other reason go beyond the fair limits of the granting act, it is his duty to disapprove them, and the same reasons which would justify him in disapproving an application, if made, will justify his interference when a railroad company undertakes to construct its road without submitting its case to him for his determination.

If, however, the *Jones case* is to be taken as holding only that the existence of a completed railroad upon public lands is notice to an intending settler of a claim to a right of way, which when perfected by the filing and approval of a map is entitled to priority over his intervening entry, then the act is given full force and effect as it stands and manifest equities are preserved. Such a construction is not only consistent with the language of the statute but also with the general rules of law by which priority of right is determined as between claimants under the public land laws. As a rule, when two parties, by permission of Congress, go upon the public lands and erect structures of public or private utility with a view to the acquisition of an easement or title under the applicable land law, that party is prior in right who is prior in time. (*Shepley* v. *Cowan*, 91 U. S., 330, 338.) This rule is founded, in some cases, on the general policy of the land laws; in others, upon decisions of the courts intended to promote justice and recognize equities; and, in still others, upon express provisions of law, as in the case of settlements with a view to the acquisition of title under the homestead laws. (21 Stat., 140, sec. 3.) The rule applies, however, only as between the parties.

The act which gives priority to one party does not necessarily give any right as against the United States. Such a right is acquired only upon performance of those acts which are prescribed by Congress as the conditions upon which the right

or title shall pass from the Government. To give only the most familiar case, an actual settlement—the erection of a house and the establishment of a residence therein—gives the settler a right to be preferred over all subsequent comers in the acquisition of the Government title if the Government is to dispose of the title under the public land laws; but it initiates no right as against the Government. The latter may withdraw the lands from disposition, devote them to a public use, and oust the settler from his possession without making him any compensation. *Frisbie* v. *Whitney*, 9 Wall., 187; *Hutchings* v. *Low* (The Yosemite Valley case), 15 Wall., 77.

The rule of priority between claimants is no doubt founded in part at least on the idea that actual and lawful possession evidenced by some permanent structure, as the house of the settler, the ditch of the miner, or the constructed railroad, is notice to all comers of an existing claim which, if the Government continues to hold the land open to private acquisition, may ripen into a title by the performance of the conditions imposed by Congress. Let it be conceded that a railroad company upon the filing and approval of its articles of incorporation and proofs of organization may lawfully go upon the unreserved and unappropriated public lands under the statute now in question and construct its road. Under the rule above referred to it may acquire a priority before acquiring title. It may acquire both priority and title (a title for-

feitable for failure to construct) by the filing and approval of its profile map. It may acquire a right of priority alone by actual construction.

Definite and final location is no doubt the logical time for the beginning of priority; but as this court held in the *Doughty case, supra,* the mere staking out of a line is not sufficient *evidence* of definite location. Another intending claimant would have no knowledge of a resolution of the company's board of directors adopting the staked-out line as the final route, and the stakes might easily be removed to a different place. It is a matter of common knowledge that various surveys are usually made before a railroad company finally decides upon the route to be followed. Hence, as this court has in substance held, the permanent structure of a completed railroad is alone sufficient to apprize another of the company's occupancy and give it priority in the absence of a public record resulting from compliance with section 4 of the act.

The attitude of the Land Department upon the question now under discussion has not been uniform. The regulations explanatory of this act, approved in January, 1888, declared:

> The requirements of the law regarding the filing of the proper papers and maps are conditions precedent to the obtainment of the right to construct a railroad over the public lands, or to take therefrom material, earth, stone, and timber for its construction, or to occupy them for station or other purposes. It is therefore imperative that proper steps,

> as pointed out in this circular, should be taken by a company, and the approval of the Secretary of the Interior obtained, prior to the construction of any part of its road or its occupancy of the public lands in any manner. (12 L. D., 426.)

This declaration was reiterated as late as March, 1892 (14 L. D., 340), despite the dicta contained in the intervening decision of *Dakota Central R. R. Co.* v. *Downey*, 8 L. D., 115.

3. *The withdrawn lands were excluded from the operation of the statute by the terms of the statute itself.*

The fifth section of this act reads:

> That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed.

Lands withdrawn for disposition under the reclamation law are "lands especially reserved from sale" within the meaning of this section.

(*a*) Such lands are not sold by the Government. The settlers acquire title by residence and reclamation, and by fulfilling their obligation to reimburse the Government for the money laid out in constructing, maintaining, and operating the works (*Swigart* v. *Baker, supra*). The word "sale" has a definite technical meaning. There must be a money consideration for the thing sold. See Bouvier's Law Dict., 943; Rapalje & Lawrence Law

Dict., 1144; *Commonwealth* v. *Davis,* 12 Bush (Ky.), 240, 241; *Picard* v. *McCormick,* 11 Mich., 68, 77; *Schenck* v. *Saunders,* 13 Gray, 37, 41.

In *Williamson* v. *Berry,* 8 How., 495, 543, this court said:

> "*Sale*" is a word of precise legal import, both at law and in equity. It means at all times a contract between parties, to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold. Noy's Max., ch. 42; Shep. Touch., 244.

And in the *Five Per Cent cases,* 110 U. S., 471, 480:

> The question before us is not whether the promise by the Government of a bounty in land or money to persons entering the military service is a contract for valuable consideration; but whether, when carried into effect, it constitutes a sale by the Government; and it is quite clear that land granted by way of reward for military services has never been treated, in the legislation of the United States upon the subject, as sold, but has always been considered as analogous to money paid in a gross sum by way of bounty.

Lands acquired by settlers under the reclamation act are, like homesteads, in the nature of bounties.

See

Smith v. *Townsend,* 148 U. S., 490, 497.
Anderson v. *Carkins,* 135 U. S., 483, 488.
McCune v. *Essig,* 118 Fed., 273, 277.

Congress in its land laws appears to have employed the words "sale" and "purchase" with consistent regard for their technical meaning. Thus we do not find them in the homestead laws (R. S., secs. 2289–2291), or the reclamation act, but they are present in those acts which contemplate the disposition of the public land for a consideration consisting in whole or in part of money, such as the old laws providing for the sale of public lands at public entry and subsequent private entry (see R. S., secs. 2353–2379), now repealed by the act of March 3, 1891 (ch. 561, 26 Stat., 1099, sec. 9), and in the more modern acts, like the "Act for the sale of timber-lands," etc., of June 3, 1878 (20 Stat., 89), and the "Act to provide for the sale of desert lands," etc., of March 3, 1877 (19 Stat., 377).

(*b*) When this statute was enacted, to reserve lands "from sale" was synonymous with withdrawing them from all forms of disposition under the general land laws of the time. Speaking generally, all of the public lands not particularly reserved or affected by private claims were subject to purchase under the preemption law (when surveyed), Revised Statutes, section 2257 *et seq.*, or the mineral land laws, and salability was a condition to their acquisition under the other laws, such as the homestead and bounty laws, which did not demand a pecuniary consideration. The expression in the fourth section of the act therefore means to-day, giving it its freest interpretation, lands of a class

which the Government has specially set apart from general disposition, because either of some public plan or policy in regard to them, or to satisfy some grant or obligation of the Government.

The reclamation " units " fall clearly within the exception, not merely because they are not to be sold for money, but because they are withdrawn to accomplish a particular plan in the due execution of which they must be used by the Government (for the construction, extension, maintenance, and operation of canal systems), and their farming value protected and developed under governmental supervision; and because also they, or, more accurately, their usefulness, stands as a security for the Government's investment.

This special interest of the Government can not be said to be displaced until the payments required by the act have been made for the major portion of the lands, and the management and operation of the works pass from the Government to the farmers as the reclamation act prescribes (sec. 6).

4. *Independently of its own express provisions which require approval by the Secretary and exclude lands specially reserved, the act of 1875, when construed in pari materia with the reclamation act, does not authorize railroad construction in reclamation projects against the objection of the Secretary of the Interior.*

In view of what we have already said concerning the relations of the reclamation act to this statute

and to the act of 1873 as amended, it is quite unnecessary to discuss this proposition. Either we are wholly wrong in our conception of the rights and functions retained by the Government in the withdrawn areas of irrigable lands, or, necessarily, this proposition is correct.

CONCLUSION.

It is respectfully submitted that the decree of the court below should be affirmed.

ERNEST KNAEBEL,
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OCTOBER, 1914.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

MINIDOKA & SOUTHWESTERN RAILROAD Company and Utah Construction Company, Appellants, *v.* THE UNITED STATES. — No. 19.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

In the administration of the railway right of way act of 1875, and the analogous provisions concerning rights for irrigation purposes contained in the act of March 3, 1891 (c. 561, 26 Stat., 1101, secs. 18–21; see our original brief, p. 38), the function confided to the Secretary of the Interior is something more than the clerical or ministerial function of passing upon the mere form of articles of incorporation and maps of location. As was remarked by the court below (R., 209):

> The requirement of the statute that the railroad company shall file with the register and receiver the profile of its road and this

> profile shall be approved by the Secretary of the Interior before any right attaches, is an important and far-reaching provision, in view of the general authority conferred upon the Secretary of the Interior by the various acts of Congress relating to the public lands and particularly by section 441 of the Revised Statutes, wherein he is charged with the supervision of the public business relating to the public lands.

Therefore, in a number of the Secretary's decisions, it has been held that where the granting of an application will work harm to some interest of the Government approval should be refused.

Thus in the case of the *Denver, Northwestern & Pacific Ry. Co.* v. *Hydro-Electric Power Co.*, 32 L. D., 597, it was decided that the filing of the requisite papers and map of final location in due form, prior to the construction of the road, initiated no right which would prevent the Secretary from rejecting the application where it appeared that the granting of the right of way would interfere with a contemplated reclamation project; and the Secretary accordingly withheld his approval and directed that the lands involved be withdrawn under authority of the reclamation act.

In the case of *Continental Tunnel Railway Company*, 39 L. D., 86, it said:

> No right is acquired under the act of March 3, 1875, as against the United States by the simple filing of the articles of incorporation and the maps of location therein

> provided for, until the approval thereof by the Secretary of the Interior. At any time before such approval the land may be reserved from sale by the Executive authority for uses authorized by law which would defeat the application.

And it was held (we quote the syllabus) that (p. 86):

> Where an application for railroad right of way covers public lands upon which are possible power sites, examination should be had by the Land Department, before acting upon the application, to determine whether the lands may be utilized to the best advantage for power sites or other power purposes; and if it appear that the public good resultant from withholding the land for power development is disproportionate to the benefits to be derived from construction of the railroad, the application should be approved, even though it might interfere with development of the power; but if, on the other hand, the power possibilities are sufficient to justify utilization of the public lands for such purposes to the exclusion of other uses which may conflict, the lands should be withdrawn and the application rejected, unless the line of road can be so located as not to interfere or conflict with the use of the land for power purposes.

See, also, the case of *Skagit Power Company*, 39 L. D., 89, and the instructions of January 29, 1910, 38 L. D., 405 (annulled by that decision), which had gone so far as to require applicants for railroad

rights of way over lands where valuable power sites might be found to stipulate, as a prerequisite to approval, that they would upon proper request elevate or remove their tracks, etc., in the event of the withdrawal of lands for water-power purposes.

In the case of *Francis W. Bosco et al.*, 39 L. D., 104, the department refused to approve an application based on the act of March 3, 1891, *supra*, for a right to include certain public lands in Colorado in a reservoir designed to take water from the watershed of the Rio Grande. The refusal in this instance was in line with the policy adopted years before and consistently followed, to protect the headwaters of that stream from excessive diversions, lest the Engle Dam reclamation project in New Mexico—a project for which $1,000,000 had been appropriated by Congress and which involved an estimated cost of $7,000,000 or more—should become endangered. The project is designed to supply water for the irrigation of large areas of land in New Mexico and Texas, and also to provide water for use in Mexico pursuant to a treaty existing between this country and that Republic. In his decision the Assistant Secretary, referring to the claim that the contemplated diversion of water would work no injury, observed (p. 107):

> The department is by no means convinced that this is true, and in the absence of such conviction it is believed to be the duty of the Secretary of the Interior to exercise such discretion as is necessary to protect the interests of the United States.

In the case of *D. C. McWatters*, 41 L. D., 485, an application for a reservoir site was rejected because the use of the reservoir might work harm to the Minidoka reclamation project.

In *California-Nevada Canal, Water & Power Co.*, 40 L. D., 380, 384, which involved an application under the act of 1891 affecting lands within a national forest, the Assistant Secretary said:

> In the very necessities of the case, whatever might be said as to application under said acts for rights of way upon the unreserved public domain, it may not be successfully disputed that the exercise of this jurisdiction within a reservation of the United States involves the exercise of more than a mere legal discretion. In other words, that discretion may and should look beyond the technical sufficiency of the application and in broad view should subserve the interests of the whole people.

By the act of March 2, 1899, 30 Stat., 990, rights of way through Indian reservations for railway and other purposes are "hereby granted" to any railway company duly organized, etc., which complies with the provisions of the act. The act (section 3) provides that a road may be surveyed and located by permission of the Secretary, but that "before the grant of such right of way shall become effective a map of the survey of the line or route of said road must be filed with and approved by the Secretary of the Interior, and the company must make payment" of full compensa-

tion for the benefit of the Indians. In the case entitled *San Carlos Reservoir Site,* 40 L. D., 470, it was held that an application under this statute for a railway right of way through a narrow canyon, which formed the most feasible site in that region for impounding the waters of the Gila River, should be refused unless the company elevated its location to a contour above the reservoir site. At page 473 it is said:

> Certainly the railroad should not be permitted to destroy the possibilities incident to the irrigation of the arid lands in the valley, including Indian lands, and the resulting agricultural prosperity of that portion of Arizona, from which the railroad itself will ultimately derive a substantial benefit, especially where a change in the location of its line is reasonably possible.

It is submitted that the broad view of the Secretary's power is consistent with his broad general duties as the guardian of the public lands and the administrator of all the public land laws (*Knight* v. *Land Ass'n.*, 142 U. S., 161, 181; *Riverside Oil Co.* v. *Hitchcock,* 190 U. S., 316); that it is consistent with the language of the right of way acts, which does not in terms abridge the discretion naturally implied in the word "approve"; and that it is essential to the proper protection of the Government, whose manifold interests might readily be impaired under such general statutes as these if no latitude of discretion were conceded in their execution.

If an application for a right of way for a railroad, or for a large irrigation canal, or reservoir, within a reclamation project, were submitted to the Secretary of the Interior, he, as the representative of the United States, and also of the whole body of reclamation settlers, would naturally be expected to consider very carefully the possible effects of such enterprises upon the welfare of the project, and we submit that it would be his plain duty to refuse his approval if he believed that harm would result. Indeed, it would be hard to imagine a condition of the law so utterly crude and improvident as one which would compel the guardian of so important a public interest to injure or destroy it by his own "approval."

This discretion to approve or disapprove is the discretion of the Secretary of the Interior. It exists as a peculiar means of governmental protection. Therefore it is not to be evaded by ignoring the Secretary and constructing the railway or canal in spite of his objection.

We earnestly submit that the orderly way in which to construe and execute these statutes is to require the railway company, or the canal company, to place its case before the Secretary of the Interior and obtain his decision, as is done in other cases arising under the general land laws. Section 4 of the railway act intends that this shall be done in all cases. The requirement is not inconsistent with the existence of a license to proceed with construc-

tion prior to approval, nor inconsistent with the idea that a railway company by construction alone may acquire rights which may not be displaced by the Land Department. But when there is a probability, or even a possibility, that the plan of the company may be hostile to the superior interests of the Government, and when the right of the company to proceed has been challenged on the Government's behalf, the company should stay its hand until the question can be duly considered and determined by the Secretary.

Whenever there is a fair question, such as would properly be addressed to the judgment and discretion of the Secretary if his judgment were requested, that question should be submitted to him as the officer or tribunal specially designated by the law to decide it.

> Concluding, as we do, that the question whether the complainant has ever made a proper selection of land in lieu of the land relinquished, has never been decided by the Land Department, but is still properly before that department, the courts can not take jurisdiction and proceed to decide such question themselves. The Government has provided a special tribunal for the decision of such a question arising out of the administration of the public land laws and that jurisdiction can not be taken away from it by the courts.
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> (*Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S., 301, 315.)

The case cited involved a forest lieu land selection. In the case of *Williams* v. *United States*, 138 U. S., 514, 524, there was under consideration an act of Congress granting lands to the State of Nevada and providing that, when selected, they should be certified to the Commissioner of the General Land Office "and approved by the Secretary of the Interior." (21 Stat., 287.) Here apparently was a direct mandate to the Secretary to approve the selections, and no reference was made to any discretion to be exercised by him. It appeared, however, that the approval was being sought in the interest of one who had entered the same land as a desert claim, assigned it illegally to an innocent third party, had subsequently relinquished the claim to the Government, and was now endeavoring to secure the title for himself. Although there was no pending claim, and apparently no method short of a special act of Congress under which the land could have been granted to the injured third party, this court held that, under the circumsances, it was the duty of the Secretary to withhold his approval of the State selection to await congressional action if necessary, and that a certification of the tract, which had issued inadvertently, was properly canceled by the decree under review. It declared that the Secretary's *approval* of such selections was "no mere formal act"; that he was allowed no arbitrary discretion, but did have power to prevent the injustice sought to be perpetrated; and that to meet

the "matters not foreseen," and "equities not anticipated," arising in "such large and varied interests as are intrusted to the Land Department," * * * "the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unforeseen contingencies, to do justice."

See, also, *St. Paul, M. & M. Ry. Co.* v. *Sage*, 71 Fed., 40, 49; *Buttz* v. *Railroad Co.*, 119 U. S., 55, 72.

Respectfully submitted.

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OCTOBER, 1914.

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MINIDOKA & SOUTHWESTERN RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 19. Argued October 29, 30, 1914.—Decided November 30, 1914.

Under the policy of the Government to encourage the building of railroads in the western States, Congress has in some cases granted land to aid in construction and has also provided the means by which those companies not having such grants can, under reasonable conditions, acquire rights of way over public lands.

While the right of way statute only applies to public lands and, therefore, does not apply to lands segregated from the public domain by homestead entries, settlers may, under § 2288, Rev. Stat., grant rights of way over land before final proof.

Nothing in the Reclamation Act of June 17, 1902, 32 Stat. 388, affects the provision of § 2288, Rev. Stat., permitting a homesteader without patent, but in lawful possession, to grant to a railroad company a right of way across his claim.

The privileges for granting to railroad companies rights of way over homesteaders' land under entry were renewed and extended by the act of March 3, 1905, c. 1424, 33 Stat. 991.

In this case, *held* that the various acts of Congress in effect operated to give the consent of the United States to the construction of a railroad as an instrumentality of commerce across the lands of those homesteaders within the limits of the Minidoka Irrigation Project in Idaho who gave deeds for the right of way to the railroad company.

190 Fed. Rep. 491, reversed, and 176 Fed. Rep. 762, affirmed.

THE facts, which involve the construction of acts of Congress regarding railroad rights of way and the right of entrymen within the reclamation projects to deed rights of way for railroads, are stated in the opinion.

Mr. Henry W. Clark and *Mr. A. A. Hoehling, Jr.*, with whom *Mr. P. L. Williams* was on the brief, for appellants:

The authority to convey a right of way for railroad pur-

poses expressly given to homestead settlers by § 2288, Rev. Stat., is not impaired by the provisions of the Reclamation Act.

The lands in question were not public lands and there was no authority under the general right of way act of 1875 for the filing or approval of a map of definite location affecting them.

The right of way granted by the homestead settlers under the authority of § 2288 is complete and perfect. The statute itself operates as the consent of the Government to subject its interest in the land to the right of way during the life of the homestead entry and also after forfeiture of the homestead.

The dictum of the Circuit Court of Appeals that the general right of way act requires the filing of a profile of the road rather than a map of alignment or definite location is contrary to the practice of nearly forty years.

In support of these contentions see *Alexander* v. *Kansas City R. R. Co.*, 138 Missouri, 464; *Bardon* v. *Nor. Pac. R. R. Co.*, 145 U. S. 535; *Barker* v. *Harvey*, 181 U. S. 481; *Dakota Cent. R. R. Co.* v. *Downey*, 8 L. D. 115; *Jamestown &c. R. R. Co.* v. *Jones*, 7 No. Dak. 619; *S. C.*, 177 U. S. 125; *Kern Valley Water Co.*, 15 L. D. 577; *Montana Cent. R. R. Co.*, 25 L. D. 250; *Northern Lumber Co.* v. *O'Brien*, 204 U. S. 190; *Regulations under General Right of Way Act*, 33 L. D. 481; *Santa Fe &c. R. R. Co.*, 22 L. D. 685; *Stalker* v. *Oregon Short Line*, 225 U. S. 142; *Un. Pac. R. R. Co.* v. *Harris*, 215 U. S. 386; *United States* v. *Buchanan*, 232 U. S. 72.

Mr. Assistant Attorney General Knaebel, with whom *Mr. W. W. Dyar* was on the brief, for the United States:

The right to build and operate a railroad through a reclamation project without consulting the Government

should not be adjudged to exist unless plainly conferred by some act of Congress.

The act of March 3, 1873, as amended, does not empower the entrymen to authorize the construction of a railroad through a reclamation project without the consent of the Secretary of the Interior.

The act merely authorizes the settler to relinquish in part the privileges which he enjoys under the settlement law, not to convey the title or to impair in any way the interest of the Government.

As to lands which, like the lands of reclamation projects, are affected by a special public interest, the act of March 3, 1873, if applicable at all, should be construed as a means of securing the consent of the settler to the uses mentioned, but not to permit those uses in the absence of governmental approval.

Construed *in pari materia* with the Reclamation Act, the act of March 3, 1873, as amended, can be deemed operative only in so far as consistent with the proper management and welfare of such projects. This necessarily implies that the transfers of the settlers must remain ineffectual if not approved or if objected to by the Government through the Secretary of the Interior.

Under the statute no vested right arises against the Government until a map showing the railroad location has been filed with and approved by the Secretary of the Interior.

The withdrawn lands were excluded from the operation of the statute by the terms of the statute itself.

Independently of its own express provisions, which require approval by the Secretary and exclude lands specially reserved, the act of 1875, when construed *in pari materia* with the Reclamation Act, does not authorize railroad construction in reclamation projects against the objection of the Secretary of the Interior.

In support of these contentions see *Anderson* v. *Carkins*,